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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

FRANCISCO LOPEZ,

Petitioner,

v.

GAY C. RICCA-STROUD,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a court of appeals has jurisdiction to review a district court decision remanding a case to a bankruptcy court for further proceedings, when the bankruptcy court decision was final and the appeal would determine a legal issue that could make the remand unnecessary?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the United States Court of Appeals for the Seventh Circuit were Dr. Francisco Lopez as Defendant-Appellant and Gay C. Ricca-Stroud as Plaintiff-Appellee.

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PETITION FOR A WRIT OF CERTIORARI

Dr. Francisco Lopez petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion (Pet. App. 1a) is reported at 116 F.3d 1191. The district court's opinion remanding in relevant part (Pet. App. 7a) is reported at 201 B.R. 943. The district court's opinion denying rehearing (Pet. App. 16a), the bankruptcy court's order granting a discharge (Pet. App. 19a), and the bankruptcy court's oral opinion supporting its order (Pet. App. 20a) are all unreported.

JURISDICTION

The court of appeals' judgment was entered on June 27, 1997. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The statutory provisions at issue, 28 U.S.C. § 158 (1988 & Supp. V 1993),[1] and 28 U.S.C. § 1291 (1994), are set forth in the appendix. Pet. App. 25a-26a.

STATEMENT OF THE CASE

The case presents an important and recurring question about appellate bankruptcy jurisdiction that has split the circuits since soon after Congress passed the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549. The bankruptcy appellate jurisdiction statute, 28 U.S.C. § 158(d), provides courts of appeals with jurisdiction over "appeals from all final decisions, judgments, orders, and decrees entered" by district courts (or

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[1] The version of Section 158 in effect at the time this case was filed is set forth in the appendix. It was amended in 1994, *see* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, Title I, § 104(c), 108 Stat. 4106, 4109-4110, but the pertinent subsection was unchanged by the 1994 amendments.

bankruptcy appeals panels) sitting as appeals courts in bankruptcy. Likewise, the general appellate jurisdiction statute, 28 U.S.C. § 1291, provides courts of appeals with jurisdiction over "all final decisions of the district courts."[2] This case presents the following question: when a district court reviews a bankruptcy court's final decision and remands to the bankruptcy court for further proceedings, whether there can be a "final decision" that the court of appeals has jurisdiction to review.

In an opinion by Chief Judge Posner below, the Seventh Circuit applied the majority rule. The court ruled that a district court's decision remanding a matter to a bankruptcy court is not final, and so not appealable, if the remand requires the bankruptcy court to take any actions that go beyond the ministerial. Pet. App. 1a. The Seventh Circuit disagreed with the decisions by other circuits that would allow a more flexible approach to jurisdiction. *Id.* at 3a. Chief Judge Posner then wrote to "invite the Supreme Court's attention to a persistent circuit split that only the Supreme Court can heal." *Id.* at 1a.

1. Petitioner Dr. Francisco Lopez filed for bankruptcy under Chapter 7 of the Bankruptcy Code, 11 U.S.C. §§ 701-766, in November 1993. The United States District Court for the Northern District of Illinois had jurisdiction under 28 U.S.C. § 1334; venue was proper under 28 U.S.C. § 1408; and the case was referred to the Bankruptcy Court under 28 U.S.C. § 157(a).

Under Chapter 7, if the court granted Dr. Lopez a discharge, then Dr. Lopez would be released from liability for certain debts. *See* 11 U.S.C. §§ 507, 522, 726. Creditors could not further seek to hold Dr. Lopez liable for the discharged debts. *See* 11 U.S.C. §§ 524, 727(b). Nor could creditors assert a claim against his future earnings. *See* 11 U.S.C. § 541(a)(6). On the other hand, if a discharge were denied, Dr. Lopez still would be

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[2] Sections 158(d) and 1291 overlap, with either providing jurisdiction over final decisions by district courts sitting as appeals courts in bankruptcy. *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992).

indebted to all of his creditors, and they could seek to have their debts satisfied out of his future earnings.

Respondent Gay C. Ricca-Stroud, a creditor, opposed Dr. Lopez's bankruptcy discharge and filed an adversary proceeding seeking to deny the discharge on the grounds that he had failed to disclose or significantly undervalued assets on his bankruptcy schedules. Ms. Ricca-Stroud invoked 11 U.S.C. § 727(a)(4)(A), which provides that the debtor is entitled to a discharge unless he "knowingly and fraudulently, in or in connection with the case . . . made a false oath or account." Pertinent here, Dr. Lopez had placed a $500 liquidation value on his medical practice, and Ms. Ricca-Stroud alleged this was a knowing and fraudulent false oath because the value of the practice far exceeded this figure. In preparing his schedules, Dr. Lopez relied on experts who valued the practice on the assumption that the trustee who would be assigned to administer Dr. Lopez's bankruptcy estate could sell the stock in Dr. Lopez's medical corporation to a third party. In that case, Dr. Lopez would leave the corporation and start a separate practice as he was entitled to do because 11 U.S.C. § 541(a)(6) exempts future earnings from the property of the estate. Accordingly, Dr. Lopez's advisor valued the stock at its liquidation value, which was negligible because the corporation's liabilities far exceeded its assets. Ms. Ricca-Stroud's expert, on the other hand, assumed that Dr. Lopez would participate in the transition of the practice to a new owner.

The bankruptcy court found that Dr. Lopez had not knowingly and fraudulently made a false oath about his medical practice's value and thus granted the discharge. *See* Pet. App. 19a, 23a. Over parts of three days, the bankruptcy court had taken evidence about the possible ways to value a medical practice and how those methods would apply in different scenarios, including one in which the business would not continue as a going concern and Dr. Lopez would leave the practice. The court found that Dr. Lopez would not continue to work for the corporation after bankruptcy should the trustee sell the stock and that the

corporation could not continue as a going concern after bankruptcy without Dr. Lopez. *Id.* at 22a.

Under the circumstances, the court found that Dr. Lopez did not have the intent to knowingly and fraudulently undervalue his practice:

> The Court also feels that it has not been established that Dr. Lopez knowingly and fraudulently made any false oath or account. The Court is satisfied that Dr. Lopez is a credible witness who left the details of his business [—] and I don't find that this was reckless conduct on behalf of Dr. Lopez [—] to his staff and to his lawyers to make these valuations that he accepted and signed for.

Id. at 23a.

2. Ms. Ricca-Stroud then appealed to the United States District Court for the Northern District of Illinois. The district court indisputably had jurisdiction over Ms. Ricca-Stroud's appeal because the bankruptcy court's decision was final. 28 U.S.C. § 158(a).

On appeal, the district court remanded for further proceedings. The district court ruled that an intervening Seventh Circuit decision, *In re Prince*, 85 F.3d 314 (7th Cir.), *cert. denied*, 117 S. Ct. 608 (1996), had established the proper valuation procedure for a medical practice. Pet App. 10a-12a. The district court remanded for the bankruptcy court to develop facts regarding the valuation, specifically:

> First, [the bankruptcy court] must decide whether Dr. Lopez' medical corporation could continue as a going concern. Second, if the corporation could continue as a going concern, it must determine what the present value of the stock would be given the probability of any future events and their impact on the value of the stock.

Pet. App. 11a-12a. The court noted, "if the facts demonstrate that Dr. Lopez intended to continue to work for or operate the

corporation as a going concern, then the veracity of his oath may be in doubt." *Id.* at 12a n.2.

But at the same time the district court, while noting that Dr. Lopez's valuations might have been wrong, apparently affirmed the bankruptcy court's findings on the central issue in the case: Dr. Lopez's intent. According to the district court, the record showed that Dr. Lopez was a credible witness on this matter. The court affirmed the finding that Dr. Lopez was justified in relying upon experts to value his medical practice. Pet. App. 12a-13a. Indeed, the district court held, "[Dr. Lopez] lacks the basic knowledge, let alone expertise, necessary to dispute the calculations." *Id.* at 13a. Hence, the district court held that "the record supports the bankruptcy court's factual findings and credibility determination with regard to the truthfulness of Dr. Lopez' oaths and his lack of reckless intent." *Id.*

3. The district court then denied Dr. Lopez's motion for rehearing. In so doing, it reiterated that the bankruptcy court had to consider the valuation method described in *In re Prince*. The district court instructed the bankruptcy court to consider whether Dr. Lopez's medical practice could continue as a going concern, even though the bankruptcy court had already addressed and decided this issue. Pet. App. 17a. While the district court noted that Dr. Lopez had already testified on this point, saying that he would not keep working for his medical corporation if it were sold, the court felt that he had not been fully cross-examined, though Ms. Ricca-Stroud had not claimed any inability to fully examine Dr. Lopez and his experts before the bankruptcy court or raised a procedural objection on appeal to the district court. *Id.*

4. Dr. Lopez appealed to the United States Court of Appeals for the Seventh Circuit. His position on the merits was, and is, that the district court's remand order constituted legal error. First, the bankruptcy court approached the valuation issue properly and consistently with the later *In re Prince* decision, assuming that *In re Prince* even applies outside the context of a

Chapter 11 proceeding. Second, even if Dr. Lopez's valuation were open to question, there was no basis for finding that Dr. Lopez made a false oath. To deny a discharge, the bankruptcy court must conclude that the plaintiff showed that the debtor knew his statement was false and made it with fraudulent intent. *See Beaubouef v. Beaubouef (In re Beaubouef)*, 966 F.2d 174, 178 (5th Cir. 1992); *Williamson v. Fireman's Fund Ins. Co.*, 828 F.2d 249, 251 (4th Cir. 1987). In this case, the district court could not and did not make such a finding, much less a finding that the bankruptcy court's determination was clearly erroneous. Instead, the district court ruled that Dr. Lopez lacked "the basic knowledge" needed to dispute a $500 valuation of his business; he reasonably relied on his accountants to value the business;[3] and, thus, "the record supports the bankruptcy court's factual findings and credibility determination with regard to the truthfulness of Dr. Lopez' oaths and his lack of reckléss intent." Pet App. 13a. Finally, Ms. Ricca-Stroud had raised no procedural irregularity warranting remand. No limitation had been imposed on her scope of cross-examination, no objection had been raised in the bankruptcy case to the scope of cross-examination and no issue had been raised in her appeal to the district court. As a matter of law, there was no basis for a remand.

5. The Seventh Circuit, in an opinion by Chief Judge Posner, dismissed the appeal for lack of jurisdiction. The court indicated that its position, dating back to 1984, has been that,

> even if the decision of the bankruptcy court is final, a decision by the district court on appeal remanding the bankruptcy court's decision for further proceedings in the bankruptcy court is not final, and so is not appealable to this court, unless the further proceedings contemplated are of a purely ministerial character, such as calculating prejudgment interest when the

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[3] An explanation that the debtor relied in good faith on professional advice in making his oath generally rebuts an inference of fraud. *See In re Mascolo*, 505 F.2d 274, 277 (1st Cir. 1974).

> amount of the judgment, the interest rate, and the period over which the interest is to be calculated are all uncontested.

Pet. App. 1a. The Seventh Circuit held that this was not a purely ministerial remand because it called for additional factual findings; thus, the Seventh Circuit lacked jurisdiction. *Id.* at 2a.

Even though the Seventh Circuit resolved this case easily under its precedent, it wrote to "reiterate this circuit's position [and] to invite the Supreme Court's attention to a persistent circuit split that only the Supreme Court can heal." Pet. App. 1a. The Seventh Circuit cataloged at length the circuit split concerning bankruptcy appellate jurisdiction. It cited minority cases dating back to 1982 that, it said, "allow an appeal from an order . . . remanding the case to the bankruptcy court if on balance the goal of an expeditious winding up of the bankruptcy proceeding will be furthered by allowing an intermediate appeal." *Id.* at 3a. But the court defended its own, more restrictive, standard as more consistent with the statutory language, the bankruptcy traditions, and the goal of simpler jurisdictional rules. *Id.* at 5a-6a.

REASONS FOR GRANTING THE WRIT

Since bankruptcy reform in 1978, the relationship between the levels of the court system has been one of the most critical, sensitive and hotly disputed issues in bankruptcy. *See, e.g., Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). Bankruptcy is the only area of federal jurisdiction where one court decides a case, then the appeal runs through the district court before reaching the court of appeals. *See* 1 William L. Norton, Jr., *Norton Bankruptcy Law and Practice* § 17.01, at 17 n.4 (1991) (citing H.R. Rep. No. 95-595, at 41 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6002). Bankruptcy is unusual also because one case may encompass many different disputes and controversies. *Artoc Bank & Trust, Ltd. v. Apex Oil Co. (In re Apex Oil Co.)*, 981 F.2d 302, 304 (8th Cir. 1992).

Bankruptcy proceedings' unique nature has led courts to develop a flexible approach to determine when a matter is final

and thus appealable. "Virtually all decisions agree that the concept of finality applied to appeals in bankruptcy is broader and more flexible than the concept applied in ordinary civil litigation." 16 Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 3926.2, at 270 (2d ed. 1996). This is true even of the majority rule cases.[4] The flexible bankruptcy finality rule thus causes some decisions even in those circuits to be considered "final" that would not in other contexts. *See id.* at 290. This "flexibility is required not only because some procedures and remedies are unique to bankruptcy but also because of the ways common procedures and remedies interact with administration of the entire proceeding." *Id.* Even though virtually all courts would thus expand the definition of finality in the bankruptcy field, the majority courts become improperly rigid in some cases such as this one where an appeal to the court of appeals would quickly and efficiently wrap up a bankruptcy proceeding.

The search for an appropriate standard "has been the subject of a fairly extensive debate." *In re Gould & Eberhardt Gear Mach. Corp.*, 852 F.2d 26, 29 (1st Cir. 1988). Commentators repeatedly have noted this continued judicial disagreement and have reached different conclusions about the proper rule.[5] This

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[4] *See, e.g., Pegasus Agency, Inc. v. Grammatikakis* (*In re Pegasus Agency, Inc.*), 101 F.3d 882, 885 (2d Cir. 1996); *Jove Eng'g, Inc. v. IRS* (*In re Jove Eng'g, Inc.*), 92 F.3d 1539, 1548 (11th Cir. 1996); *but see Farmers Home Admin. v. Buckner* (*In re Buckner*), 66 F.3d 263, 265 (10th Cir. 1995) (applying traditional finality standard in bankruptcy).

[5] *Compare* 16 Wright, *Federal Practice and Procedure*, § 3926.2, at 278-79 (approving form of minority rule) *and* Joseph Mitzel, Note, *When is an Order Final?: A Result-Oriented Approach to the Finality Requirement for Bankruptcy Appeals to Federal Circuit Courts*, 74 Minn. L. Rev. 1337, 1365-66 (1990) (same) *with* 1 *Collier on Bankruptcy* ¶ 5.09[1] (Lawrence P. King, ed., 15th ed. rev. 1997) (approving majority rule) *and* John P. Hennigan, Jr., *Toward Regularizing Appealability in Bankruptcy*, 12 Bankr. Dev. J. 583, 640-42 (1996) (same). *See also, e.g.*, Edith H. Jones, *Bankruptcy Appeals*, 16 T. Marshall L. Rev. 245, 253 (1991) (describing "elusive" quest for

case presents that issue, which is "hopelessly unresolved" in the courts of appeals.[6] The Court should grant the petition for certiorari to resolve the circuit split and to address the important jurisdictional question presented.

I. THE COURTS OF APPEALS ARE DEEPLY DIVIDED ON THE QUESTION OF WHEN THEY HAVE JURISDICTION OVER DISTRICT COURT ORDERS THAT DO NOT COMPLETELY DISPOSE OF BANKRUPTCY PROCEEDINGS

As Chief Judge Posner noted in seeking this Court's attention, this issue suffers from a "persistent circuit split that only the Supreme Court can heal." Pet. App. 1a. Eight courts of appeals have seemingly approved the rule applied in this case, restricting appeals to only those cases where the district court remands for purely ministerial actions:

> [A] decision by the district court on appeal remanding the bankruptcy court's decision for further proceedings in the bankruptcy court is not final, and so is not appealable . . ., unless the further proceedings contemplated are of a purely ministerial character, such as calculating prejudgment interest when the amount of the judgment, the interest rate, and the period over which the interest is to be calculated are all uncontested.[7]

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standard); Preston T. Towber, *A Uniform Approach to Determining Finality in Bankruptcy Appeals Under 28 U.S.C. Section 158(d)*, 29 S. Tex. L. Rev. 587, 588 (1988) (describing "jurisdictional quagmire").

[6] *Bonner Mall Partnership v. U.S. Bancorp Mortgage Co. (In re Bonner Mall Partnership)*, 2 F.3d 899, 903 n.9 (9th Cir. 1993) (quoting 1 *Collier on Bankruptcy* § 3.03[6][b], at 3-192 (Lawrence P. King, ed., 15th ed. 1992)), *cert. dismissed*, 513 U.S. 18 (1994); *In re Gould & Eberhardt Gear Mach. Corp.*, 852 F.2d at 29 (same).

[7] Pet. App. 1a; *see In re Gould & Eberhardt Gear Mach. Corp.*, 852 F.2d at 29; *DiCola v. American S.S. Owners Mut. Protection & Indem. Ass'n, Inc. (In re Prudential Lines, Inc.)*, 59 F.3d 327, 331 (2d Cir.

The other four circuits have adopted some form of a minority rule, allowing an appeal from a district court's remand in circumstances when an appeal would make the bankruptcy proceeding progress quickly and efficiently. Each adherent to the minority rule, however, has disagreed about its scope: in the minority courts, "no single formulation has emerged as canonical," according to Chief Judge Posner. Pet. App. 5a.

The Third Circuit

Following the landmark case of *Official Unsecured Creditors' Committee v. Michaels (In re Marin Motor Oil, Inc.)*, 689 F.2d 445 (3d Cir. 1982), *cert. denied*, 459 U.S. 1206 (1983), the Third Circuit "expansively interpreted the phrase 'final order'" in bankruptcy cases so that, when the bankruptcy court issued a final order and the district court issued an order affirming or reversing, the district court's order was also a final order that may be appealed. *Hammond v. Commonwealth Mortgage Corp. (In re Hammond)*, 27 F.3d 52, 55 n.5 (3d Cir. 1994). The Third Circuit invoked this rule even when the district court remanded to the bankruptcy court for further proceedings. *See, e.g., id. In re Marin Motor Oil* thus has been said to have allowed appeals of any district court order that reviewed a final bankruptcy order. *See* 16 Wright, *Federal Practice and Procedure* § 3926.2, at 277-79. Such a rule would plainly confer jurisdiction in this case.

However, in later cases, the Third Circuit has adopted a balancing test to determine whether appeals are appropriate. The court considers four factors in "balancing a general reluctance to expand traditional interpretations regarding finality and a desire to effectuate a practical termination of the matter." *Southeastern*

1995); *Department of the Air Force v. Carolina Parachute Corp.*, 907 F.2d 1469 (4th Cir. 1990); *Conroe Office Bldg. Ltd. v. Nichols* (*In re Nichols*), 21 F.3d 690, 692 (5th Cir.), *cert. denied*, 513 U.S. 962 (1994); *In re Buckner*, 66 F.3d at 265; *Clay County Bank v. Culton* (*In re Culton*), 111 F.3d 92, 93 (11th Cir. 1997); *In re St. Charles Preservation Investors, Ltd.*, 916 F.2d 727, 729 (D.C. Cir. 1990) (per curiam).

Sprinkler Co. v. Meyertech Corp. (In re Meyertech Corp.), 831 F.2d 410, 414 (3d Cir. 1987). Those factors are: (1) the impact on the bankrupt estate's assets, (2) the necessity for further factfinding on remand, (3) the preclusive effects of the court of appeals' decision on the merits on further litigation, and (4) whether judicial economy would be furthered. *Id.* The first factor — impact on the estate's assets — is most important. *Id.*; *In re Market Square Inn, Inc.*, 978 F.2d 116, 120 (3d Cir. 1992); *Porter v. Mid-Penn Consumer Discount Co. (In re Porter)*, 961 F.2d 1066, 1072-73 (3d Cir. 1992). The Third Circuit has explained its flexible rule by saying that "issues central to the progress of the bankruptcy petition, those 'likely to affect the distribution of the debtor's assets, or the relationship among the creditors,' should be resolved quickly." *Century Glove, Inc. v. First Am. Bank*, 860 F.2d 94, 98 (3d Cir. 1988) (quoting *Brown v. Pennsylvania State Employees Credit Union (In re Brown)*, 803 F.2d 120, 122 (3d Cir. 1986)). Under this rule, too, the court of appeals would have jurisdiction over Dr. Lopez's appeal because the issue at stake (whether he made a false oath) is the sole issue that will determine whether his debts will be discharged — and thereby the fate of the estate's assets — and the appeal could bring the entire bankruptcy proceeding to an end. *See, e.g., In re Meyertech*, 831 F.2d at 414 (asserting jurisdiction to decide proper damage measure, rendering remand order to recompute damage amount unnecessary).

The Ninth Circuit

The Ninth Circuit also applies a "pragmatic approach" to bankruptcy appellate jurisdiction, *Foothill Capital Corp. v. Clare's Food Market, Inc. (In re Coupon Clearing Serv., Inc.)*, 113 F.3d 1091, 1097 (9th Cir. 1997), that allows it to review cases that the majority rule courts would not hear. The Ninth Circuit has said that it considers four factors when deciding whether district court orders in bankruptcy are final: 1) the need to avoid piecemeal litigation; 2) judicial efficiency; 3) the systemic interest in preserving the bankruptcy court's role as the factfinder; and 4) whether delaying review would cause either party irreparable harm. *Stanley v. Crossland, Crossland,*

Chambers, MacArthur & Lastreto (In re Lakeshore Village Resort, Ltd.), 81 F.3d 103, 106 (9th Cir. 1996). The penultimate Ninth Circuit decision, *In re Lakeshore Village Resort*, insisted that these factors should be balanced on a case-by-case basis to determine whether the court of appeals could appropriately assert jurisdiction. 81 F.3d at 107.

The latest Ninth Circuit case, *In re Coupon Clearing Service*, implied that these factors are not to be balanced in each case but instead the factors inform the following rule: in remand cases, the court of appeals may assert jurisdiction if the issue is one of law and the appeal either 1) could end the case and obviate the need for factfinding, or 2) would materially aid the bankruptcy court in reaching its decision on remand. 113 F.3d at 1098; *Dominguez v. Miller (In re Dominguez)*, 51 F.3d 1502, 1506-07 (9th Cir. 1995); *Ernst & Young v. Matsumoto (In re United Ins. Management, Inc.)*, 14 F.3d 1380, 1384 (9th Cir. 1994).

Under Ninth Circuit precedent, the court of appeals would have jurisdiction over this case because the appeal concerns legal issues and could end the case and obviate the need for more factfinding. The appeal thus would promote the ends of judicial economy, would preserve the bankruptcy court's role as factfinder, and would prevent the harm that Dr. Lopez would suffer by waiting for the "fresh start" that is the goal of bankruptcy and the purpose of discharge.

The Eighth Circuit

Most recently, in *Stuart v. Koch (In re Koch)*, 109 F.3d 1285 (8th Cir. 1997), the Eighth Circuit said that it has traditionally considered three factors in determining bankruptcy finality:

> the extent to which (1) the order leaves the bankruptcy court nothing to do but execute the order; (2) the extent to which delay in obtaining review would prevent the aggrieved party from obtaining effective relief; (3) the extent to which a later reversal on that issue would require recommencement of the entire proceeding.

109 F.3d at 1287. While the court said, "[a]dmittedly, a district court order remanding the case to the bankruptcy court for further proceedings is not normally appealable," *id.*, it did not foreclose review of such cases. Instead, citing Ninth Circuit precedent, the Eighth Circuit indicated that it considers the policies of judicial efficiency and finality in deciding its jurisdiction. *Id.* at 1288.

As Judge Lay noted in dissent, *In re Koch* effectively adopted the minority rule over the majority standard. *Id.* at 1291-92 (Lay J., dissenting). Before *In re Koch*, some, but not all, Eighth Circuit panels reached results closer to the majority rule, as Chief Judge Posner noted below. Pet App. at 3a.

The Sixth Circuit

Two Sixth Circuit panels have adopted different views of this issue. In *Breyfogle v. Grange Mutual Casualty Co. (In re Gardner)*, 810 F.2d 87 (6th Cir. 1987), the Sixth Circuit adopted a more pragmatic approach. *See also Thompson v. Kentucky Lumber Co. (In re Kentucky Lumber Co.)*, 860 F.2d 674, 676 (6th Cir. 1988) (applying *In re Gardner*). The *In re Gardner* court rejected the majority rule and concluded that a remand order was appealable, relying largely on the fact that an appeal could end the entire case, rendering a remand unnecessary. *See id.* at 92. Under *In re Gardner*, the court of appeals could have jurisdiction over this case because the appeal could end the whole bankruptcy proceeding.

But in *SEOR, Inc. v. Textron Oil Corp. (In re Frederick Petroleum Corp.)*, 912 F.2d 850 (6th Cir. 1990), a later panel adopted what it called "a much-needed, bright-line test for determining finality," *id.* at 853-54, that it distinguished from the majority rule, the *Marin Motor Oil* rule, and its own prior position, *id.* at 852-53. It held that, for the court of appeals to have jurisdiction, the district court must enter a final judgment under Federal Rule of Civil Procedure 54(b):

> In other words, in the absence of certification by the district court as to the finality of a partial disposition, any partial

> disposition will be deemed non-final for the purposes of the exercise of appellate jurisdiction pursuant to Rule 54(b).

Id. at 853. The Sixth Circuit has not resolved the evident conflict between its cases.

Summary

Thus, "[t]here are both intra-circuit and inter-circuit disputes on this issue, leaving it unresolved."[8] Although Chief Judge Posner was uncertain whether the minority courts would have asserted jurisdiction here, Pet. App. 4a, the minority courts in fact would have done so. Those circuits would have heard this case because the issue on appeal concerned a legal issue that, if resolved in Dr. Lopez's favor, would have obviated the need for a remand, resolved all issues regarding Dr. Lopez's assets, and closed the bankruptcy proceedings entirely.

Consequently, the parties' ability to appeal may depend entirely on geographic happenstance, notwithstanding the Constitution's command that there be "uniform Laws on the subject of Bankruptcies throughout the United States," U.S. Const. art. I, § 8, cl. 4.[9] As one commentator has noted, "The attorney who litigates regularly in bankruptcy matters is often left without a clue as to what a circuit court of appeals and what a particular panel within that circuit court will do with an appeal."[10]

Nor is there any real prospect that this conflict will be resolved without this Court's intervention. The split in the courts has become more entrenched since the early 1980s, even though

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[8] 1 *Collier on Bankruptcy* ¶ 5.09[1]; *accord* Jones, *Bankruptcy Appeals*, 16 T. Marshall L. Rev. at 255.

[9] Mitzel, Note, *When is an Order Final?*, 74 Minn. L. Rev. at 1338-39 (noting that different appellate jurisdiction standards apply in bankruptcy cases arising in New York City and Newark).

[10] Towber, *A Uniform Approach to Determining Finality in Bankruptcy Appeals Under 28 U.S.C. Section 158(d)*, 29 S. Tex. L. Rev. at 591.

almost every court has explicitly noted the split,[11] and even though the issue is often presented to the courts of appeals. And this Court is unlikely to have frequent opportunities to resolve this circuit split because parties involved in bankruptcy often lack the resources or the incentive to petition for writ of certiorari in these circumstances.[12] To our knowledge, this issue has been presented to the Court on petition for writ of certiorari four times,[13] but the only one of these in the last nine years was the sketchy *pro se* petition in *Izen v. Nichols*, 513 U.S. 962 (1994). Thus, the Court has not fully been presented with the chance to resolve this conflict since it has become evident that the split is irreconcilable.

II. THE SEVENTH CIRCUIT'S DECISION WILL FRUSTRATE IMPORTANT BANKRUPTCY POLICIES

This Court has enunciated a concise definition of a "final" judgment in cases in which the district court acts as the factfinder and appeals are taken to the courts of appeals: a decision is "final" if it "ends the litigation on the merits and leaves nothing

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[11] *See, e.g., In re Gould & Eberhardt Gear Mach.*, 852 F.2d at 29 & n.2; *In re Pegasus Agency, Inc.*, 101 F.3d at 885; *In re Porter*, 961 F.2d at 1072; *Allegheny Int'l Credit Corp. v. Bowman (In re Bowman)*, 821 F.2d 245, 246-48 (5th Cir. 1987); *In re Gardner*, 810 F.2d at 91; Pet App. 3a; *In re Bonner Mall Partnership*, 2 F.3d at 904 n.9; *State Bank v. Anderson* (*In re Bucyrus Grain Co.*), 905 F.2d 1362, 1365-66 (10th Cir. 1990); *Barclays-American/Business Credit, Inc. v. Radio WBHP, Inc.* (*In re Dixie Broad., Inc.*), 871 F.2d 1023, 1028-29 (11th Cir.), *cert. denied*, 493 U.S. 853 (1989); *In re St. Charles Preservation Investors*, 916 F.2d at 728-29 & n.1.

[12] *Cf.* Jones, *Bankruptcy Appeals*, 16 T. Marshall L. Rev. at 246 ("The disincentives to appeal [in bankruptcy] are considerable.").

[13] *Izen v. Nichols*, 513 U.S. 962 (1994) (denial of certiorari); *Path-Science Lab., Inc. v. Greene County Hosp.*, 488 U.S. 820 (1988) (denial of certiorari); *L.B.G. Properties, Inc. v. Chisholm Realty Co.*, 479 U.S. 818 (1986) (denial of certiorari); *Drury v. Abdallah*, 476 U.S. 1116 (1986) (denial of certiorari).

for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945). The district court's decision here concededly is not final under this definition. But "the requirement of finality is to be given a 'practical rather than a technical construction,'" *Gillespie v. United States Steel Corp.*, 379 U.S, 148, 152 (1964) (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)), to ensure "the achievement of the 'just, speedy, and inexpensive determination of every action.'" *Brown Shoe Co. v. United States*, 370 U.S. 294, 306 (1962) (quoting Fed. R. Civ. P. 1).

Thus, the bright-line finality rule stated above is subject to qualifications that respond to pragmatic concerns. The most familiar expansion of finality is the collateral order doctrine, which allows parties to appeal orders that finally decide collateral issues, even though the case will continue, when those issues are "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen*, 337 U.S. at 546.

Additionally, in a number of specific contexts, this Court has applied a practical gloss to the definition of finality and has allowed review when orders do not meet the strict definition of finality. For example, as outlined in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), this Court has pragmatically construed 28 U.S.C. § 1257, which grants it jurisdiction over state courts' "final judgments or decrees." Also, because of the policies involved in official immunity, the Court has construed 28 U.S.C. § 1291 to further relax the collateral order doctrine in order to allow a defendant to appeal the district court's refusal to dismiss on claims of immunity. 15A Charles Alan Wright *et. al*, *Federal Practice and Procedure* § 3914.10, at 656 (2d ed. 1992); *see Johnson v. Jones*, 515 U.S. 304, 315 (1995) (acknowledging that Wright and Miller suggests that the Court has eased traditional finality requirements in this context).

Moreover, following *Sullivan v. Finkelstein*, 496 U.S. 617 (1990), some courts of appeals have begun to pragmatically view their jurisdiction over district court remands to administrative

agencies. Some appeals courts hear such cases when they could resolve important legal issues that would be effectively unreviewable after remand to the agency. Those courts note that this doctrine is similar to, but separate from, general pragmatic finality doctrines. *See Travis v. Sullivan*, 985 F.2d 919, 922 (7th Cir. 1993); *Travelstead v. Derwinski*, 978 F.2d 1244, 1247 n.7 (Fed. Cir. 1992).

Thus, in other areas of the law, courts have tailored finality requirements to specific needs and practices. In the bankruptcy context, too, virtually every court has established a more flexible view of finality based on bankruptcy's purpose and procedures. *See* 16 Wright, *Federal Practice and Procedure* § 3926.2, at 270. The Bankruptcy Code's purpose is to allow a debtor a "fresh start." *Stellwagen v. Clum*, 245 U.S. 605, 617 (1918). This goal is promoted by allowing the debtor to conclude his bankruptcy proceeding as quickly as possible, with finality and certainty. *See Katchen v. Landy*, 382 U.S. 323, 328 (1966); *In re Dominguez*, 51 F.3d at 1510 (quoting *Schunck v. Santos (In re Santos)*, 112 B.R. 1001, 1006 (B.A.P. 9th Cir. 1990)). Many bankruptcy rules are crafted with this goal in mind; indeed, courts are to interpret the Bankruptcy Code liberally in favor of the debtor. *Wright v. Union Cent. Life Ins. Co.*, 311 U.S. 273, 279 (1940). Almost every court agrees that this goal is best served by permitting appeals that may not be considered final in other contexts. *See* 16 Wright, *Federal Practice and Procedure*, § 3926.2, at 290. To promote the policy of judicial economy and quick resolution of bankruptcy matters, that flexibility should extend to grant appellate jurisdiction over cases such as this, where appeal of a legal issue could bring an end to the bankruptcy proceeding.

There are significant differences between bankruptcy appeals and ordinary civil appeals that justify a different approach in bankruptcy. As the minority courts have noted, "Many of the principal rationales for narrowly construing finality are based on an understanding of the proper relation between a trial court and an appellate court, and have less applicability when one appellate

court is asked to review what is in effect a lower appellate court."[14] In ordinary civil cases, the finality requirement "emphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact," *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981), and the concern that trials should not be interrupted by forays to appeals courts, *see Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 430 (1985); *Cobbledick v. United States*, 309 U.S. 323, 326 (1940).

But in bankruptcy appeals, "the district court and court of appeals play identical roles. The court of appeals, therefore, is in as good a position to review the case as was the district court, and the sensitive relationship between trial and appellate courts, which is a factor underlying the policy of finality, is not implicated."[15] Further, in a case such as this where the bankruptcy court has concluded the proceeding, the traditional finality concern about interrupting the trial is not present; because the trial is already over, review by the court of appeals would aid the factfinder rather than disrupt the trial.[16]

This Court should grant the petition for certiorari to address the important question presented, to resolve a persistent circuit split, and to promote the Bankruptcy Code's policies.

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[14] *In re Marin Motor Oil, Inc.*, 689 F.2d at 449; *In re Porter*, 961 F.2d at 1072; *Sambo's Restaurants, Inc. v. Wheeler* (*In re Sambo's Restaurants, Inc*.), 754 F.2d 811, 814 (9th Cir. 1985).

[15] *In re Gardner*, 810 F.2d at 91; *In re Sambo's Restaurants*, 754 F.2d at 814; *see In re Bonner Mall Partnership*, 2 F.3d at 903-04 n.10 ("the integrity of the factfinding process" is not at stake in bankruptcy appeals, since court of appeals reviews district court's decision de novo).

[16] *See In re Sambo's Restaurants*, 754 F.2d at 815.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 25, 1997

UNITED STATES COURT OF APPEALS,
SEVENTH CIRCUIT

IN THE MATTER OF FRANCISCO LOPEZ,
Debtor-Appellant.

No. 97-1089

June 27, 1997

Before POSNER, Chief Judge, and MANION and ROVNER, Circuit Judges.

POSNER, Chief Judge.

Before us is a motion to dismiss for lack of jurisdiction an appeal from a judgment by the district court remanding a case to the bankruptcy court for further findings. We asked the parties to brief the issue of our appellate jurisdiction. The appellant's brief cites cases from other circuits that might be thought to support appellate jurisdiction in a case such as this, but neglects to cite any case from this circuit — though our cases, as the cases the appellant does cite make clear, rule out such jurisdiction.

We write to reiterate this circuit's position but also to invite the Supreme Court's attention to a persistent circuit split that only the Supreme Court can heal. In a series of cases beginning with *In re Riggsby*, 745 F.2d 1153 (7th Cir. 1984), this court has held that even if the decision of the bankruptcy court is final, a decision by the district court on appeal remanding the bankruptcy court's decision for further proceedings in the bankruptcy court is not final, and so is not appealable to this court, unless the further proceedings contemplated are of a purely ministerial character, such as calculating prejudgment interest when the amount of the judgment, the interest rate, and the period over which the interest is to be calculated are all uncontested. *In re Stoecker*, 5 F.3d 1022, 1026 (7th Cir. 1993); *In re Jartran, Inc.*, 886 F.2d 859, 862 (7th Cir. 1989); *In re Fox,* 762 F.2d 54, 55 (7th Cir. 1985); *In re Goldblatt Bros., Inc.*, 758 F.2d 1248,

1250-51 (7th Cir. 1985). In such a case, the proceedings on remand are highly unlikely to generate a further appeal, so deciding the issue appealed from immediately will save time without raising the spectre of piecemeal appeals. This is not such a case. The issue is whether the debtor fraudulently undervalued his assets and so should be denied a discharge of his debts. The purpose of the remand ordered by the district court is to determine the value of the debtor's principal asset under principles set forth in a recent decision by this court, *In re Prince*, 85 F.3d (7th Cir. 1996), because whether the debtor did undervalue his assets, and if so by how much, is important to the issue of fraudulent undervaluation, though not necessarily conclusive. It is apparent that such a remand is not ministerial, and therefore we have no appellate jurisdiction if we adhere to *Riggsby* and the cases following it.

Our position is not idiosyncratic. Indeed, it is followed in at least eight of the other circuits. *See In re Gould & Eberhardt Gear Machinery Corp.*, 852 F.2d 26 (1st Cir. 1988); *In re Harrington*, 992 F.2d 3 (1st Cir. 1993); *Bowers v. Connecticut National Bank*, 847 F.2d 1019, 1023-24 (2d Cir. 1988); *In re Prudential Lines, Inc.*, 59 F.3d 327, 331-32 (2d Cir. 1995); *In re Chateaugay Corp.*, 838 F.2d 59 (2d Cir. 1988); *United States v. Carolina Parachute Corp.*, 907 F.2d 1469, 1472 n.3 (4th Cir. 1990); *Capitol Credit Plan of Tennessee, Inc. v. Shaffer*, 912 F.2d 749 (4th Cir. 1990); *In re Bowman*, 821 F.2d 245 (5th Cir. 1987); *In re County Management, Inc.*, 788 F.2d 311 (5th Cir. 1986); *In re Vekco*, 792 F.2d 744 (8th Cir. 1986); *In re Broken Bow Ranch, Inc.*, 33 F.3d 1005, 1008 (8th Cir. 1994); *In re Woods Farmers Cooperative Elevator Co.*, 983 F.2d 125, 127 (8th Cir. 1993); *In re Hansen*, 702 F.2d 728 (8th Cir. 1983) (per curiam); *In re Commercial Contractors, Inc.*, 771 F.2d 1373 (10th Cir. 1985); *In re Rex Montis Silver Co.*, 87 F.3d 435, 438 (10th Cir. 1996); *Temex Energy, Inc. v. Underwood, Wilson, Berry, Stein & Johnson*, 968 F.2d 1003 (10th Cir. 1992); *In re Grey*, 902 F.2d 1479, 1481 (10th Cir. 1990) (per curiam); *In re TCL Investors*, 775 F.2d 1516, 1518-19 (11th Cir. 1985); *In re Dixie Broadcasting, Inc.*, 871 F.2d 1023, 1028-29 (11th Cir.

1989); *In re Miscott Corp.*, 848 F.2d 1190, 1192-93 (11th Cir. 1988); *Jove Engineering, Inc. v. I.R.S.*, 92 F.3d 1539, 1548 (11th Cir. 1996); *In re Regency Woods Apartments, Ltd.*, 686 F.2d 899 (11th Cir. 1982) (per curiam); *In re St. Charles Preservation Investors, Ltd.*, 916 F.2d 727 (D.C.Cir. 1990) (per curiam). One Eighth Circuit case, *In re Bestmann*, 720 F.2d 484, 486 (8th Cir. 1983), is contrary, but in light of the number of other Eighth Circuit cases supporting the majority rule appears to be an accident.

Two circuits clearly (the Third and the Ninth), and one possibly (the Sixth), allow an appeal from an order by the district court remanding the case to the bankruptcy court if on balance the goal of an expeditious winding up of the bankruptcy proceeding will be furthered by allowing an immediate appeal. *See In re Marin Motor Oil, Inc.*, 689 F.2d 445, 448-49 (3d Cir. 1982); *In re Continental Airlines, Inc.*, 932 F.2d 282, 285-86 (3d Cir. 1991); *In re Meyertech Corp.*, 831 F.2d 410, 414 (3d Cir. 1987); *In re Hammond*, 27 F.3d 52, 55 n.5 (3d Cir. 1994); *In re Blue Coal Corp.*, 986 F.2d 687, 689 (3d Cir. 1993); *In re Comer*, 716 F.2d 168, 172 (3d Cir. 1983); *In re Bonner Mall Partnership*, 2 F.3d 899, 904-05 (9th Cir. 1993), *cert. dismissed*, 513 U.S. 18, 115 S. Ct. 386, 130 L.Ed.2d 233 (1994); *In re Stanton*, 766 F.2d 1283, 1285-87 (9th Cir. 1985) (per curiam); *In re Sambo's Restaurants, Inc.*, 754 F.2d 811, 813-15 (9th Cir. 1985); *In re Dominguez*, 51 F.3d 1502, 1506-07 (9th Cir. 1995); *In re United Insurance Management, Inc.*, 14 F.3d 1380 (9th Cir. 1994); *In re Martinez*, 721 F.2d 262, 265 (9th Cir. 1983); *In re Gardner*, 810 F.2d 87, 91-92 (6th Cir. 1987); but *cf. In re Frederick Petroleum Corp.*, 912 F.2d 850 (6th Cir. 1990). These courts do not deny that the majority rule is consistent with (in fact, it is identical to) the rule with regard to the finality of district court decisions in general, but they defend their approach by pointing out that finality has traditionally been conceived more flexibly in the case of bankruptcy appeals. E.g., *In re Marin Motor Oil, Inc., supra*, 689 F.2d at 449; *In re Bonner Mall Partnership, supra*, 2 F.3d at 903. But this is true only in a very special and limited sense, and one that has no bearing on the appealability of a remand. A

bankruptcy case is often a congeries of functionally distinct cases. The clearest example is that of the adversary action. Suppose the debtor has a tort claim against some third party. The trustee in bankruptcy will litigate that claim as an adversary action against the third party, embedded in the bankruptcy proceeding. Once the action is finally decided in the bankruptcy and district courts, the fact that the bankruptcy proceeding may be continuing is no reason to delay the appeal from the decision in the action, so the decision is deemed "final," and appeal allowed. E.g., *In re Devlieg*, 56 F.3d 32, 33 (7th Cir. 1995); *In re Kilgus*, 811 F.2d 1112, 1114-16 (7th Cir. 1987); *In re Morse Electric Co.*, 805 F.2d 262, 265 (7th Cir. 1986).

Slightly more difficult are cases in which the district court, on appeal from the bankruptcy court, resolves the status of a creditor's claim, but no judgment is entered. For example, the trustee may have contested the claim and the court have resolved the contest in the creditor's favor; so his claim has been allowed, but how much of it he will be able to collect will depend on the number and priority of other claims and the value of the debtor's estate. An immediate appeal is allowed nonetheless, e.g., *In re Riggsby, supra*, 745 F.2d at 1155; *In re Jartran, Inc., supra*, 886 F.2d at 862, because in normal cases collection proceedings are post-judgement and because all issues bearing on the claim involved in the appeal have been resolved. As is not the case when the bankruptcy court's decision with regard to the creditor's claim (or, as in this case, the debtor's claim for a discharge) is remanded for further proceedings concerning that very claim.

None of *those* cases, in which an appeal is allowed before the bankruptcy proceeding has ended, is a precedent for allowing an appeal in this case. The minority rule, which allows an immediate appeal nevertheless upon a balancing of the pros and cons of relaxing the requirement of finality — a standard so loose that it might conceivably allow an immediate appeal in the present case — amounts to the assumption by a court of appeals of a discretionary authority to allow an interlocutory appeal in bankruptcy when, all things considered, such an appeal would be consistent with sound administration of the bankruptcy laws. This

is plain from the formulation in *In re Bonner Mall Partnership, supra*, 2 F.3d at 904: ("we balance two important policies: avoiding piecemeal appeals and enhancing judicial efficiency. We also consider the systemic interest in preserving the bankruptcy court's role as the finder of fact" (footnote omitted). The provision of the Judicial Code governing appeals to the courts of appeals in bankruptcy cases does not authorize interlocutory appeals. It confines our jurisdiction to appeals from "final decisions, judgments, orders, and decrees." 28 U.S.C. § 158(d). Nor can the word "final" be thought, in light of tradition in bankruptcy cases, a term of art meaning "final or nonfinal," for we have seen that the tradition is narrower; it requires meaningful finality, albeit finality of the proceeding embedded in the overall bankruptcy case rather than of the bankruptcy case itself. The Supreme Court has been notably literal-minded of late in interpreting the provisions of the Judicial Code dealing with bankruptcy jurisdiction, see *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54, 112 S. Ct. 1146, 1149-50, 112 S. Ct. 1146, 1149-50, 117 L.Ed.2d 391 (1992), and we think it unlikely to adopt the minority rule.

There are also compelling practical objections to the rule. It is terribly woolly, as the quotation from the *Bonner Mall* opinion will have illustrated. The Third Circuit's formulation is no more precise: it involves "balancing a general reluctance to expand traditional interpretations regarding finality and a desire to effectuate a practical termination of the matter before us. Factors to evaluate in this weighing process are the impact upon the assets of the bankrupt estate, the necessity for further fact finding on remand, the preclusive effect of our decision on the merits on further litigation, and whether the interest of judicial economy would be furthered." *In re Meyertech Corp., supra*, 831 F.2d at 414. (It is telling that no single formulation has emerged as canonical.) Jurisdictional rules ought to be simple and precise so that judges and lawyers are spared having to litigate over not the merits of a legal dispute but where and when those merits shall be litigated. *In re Kilgus, supra*, 811 F.2d at 1117. The majority rule requires distinguishing ministerial from nonministerial

remands, ordinarily a simple task; just compare the lengths of the opinions applying that rule with the lengths of the opinions applying the minority rule. And we have not been made aware of any injustices that have resulted from the application of the majority rule. It is the sounder rule, and we therefore adhere to it and dismiss this appeal.

DISMISSED.

UNITED STATES DISTRICT COURT,
N.D. ILLINOIS, EASTERN DIVISION

GAY C. RICCA-STROUD,
Plaintiff-Appellant,

v.

FRANCISCO LOPEZ,
Defendant-Appellee.

No. 95 C 7189

Oct. 21, 1996

MEMORANDUM OPINION AND ORDER

BUCKLO, District Judge

In November, 1993 the defendant, Dr. Francisco Lopez, filed for bankruptcy under Chapter 7 of the bankruptcy code. The plaintiff, Gay C. Ricca-Stroud, opposed Dr. Lopez' bankruptcy discharge arguing that Dr. Lopez failed to disclose or significantly undervalued several assets on his bankruptcy schedules. On October 18, 1995 the bankruptcy court, Judge Thomas James presiding, granted Dr. Lopez his discharge and entered judgment in his favor. Ms. Ricca-Stroud filed a timely appeal and raises six errors allegedly committed by the bankruptcy court which would justify reversing the decision: (1) denial of her motion to amend the complaint; (2) finding that the $500 valuation of the debtor's medical practice corporation was not a false oath; (3) ruling that the debtor was not responsible for the truthfulness of his oath on bankruptcy schedules where he relied on agents to prepare them but did not believe all of the valuations contained therein; (4) ruling that the debtor did not make a false oath where he relied on his agents to value his assets but disclaimed responsibility for those valuations; (5) finding that the debtor did not demonstrate reckless intent rising to the level of a fraud violation under Section 727 of the Bankruptcy Code; and (6)

relying on an outside document which was not in evidence. For the reasons set forth below, the order denying leave to amend is affirmed, but the case is remanded back to the bankruptcy court for further proceedings consistent with this opinion.

Denial of Motion to Amend Complaint

On August 29, 1995 Ms. Ricca-Stroud filed her motion to amend her complaint, and the bankruptcy court heard this motion on September 8th. The court denied her motion finding that it would have been "unfair at this late date" to permit Ms. Ricca-Stroud to amend her complaint when the trial was set to occur in approximately one month. Tr. of 9/8/95, at 25. Ms. Ricca-Stroud argues that she needed to engage in discovery to learn all of the pertinent facts in order to plead the new fraud count with particularity. Moreover, she claims that she could not file her motion any earlier due to the briefing schedule and resolution of a lengthy summary judgment motion. For those reasons she contends that the bankruptcy judge abused his discretion in denying her motion. I cannot agree.

A trial judge has broad discretion when deciding whether to grant leave to amend a complaint. *See J.D. Marshall Int'l v. Redstart, Inc.*, 935 F.2d 815, 819 (7th Cir. 1991). A judge's decision on such a matter may be reversed only for an abuse of discretion because "[a] trial judge is particularly well-situated to judge the worthiness of a plaintiff's motion to amend his complaint, having been involved in the progress of the case throughout its development and having viewed first-hand the party's diligence or lack thereof." *Bohen v. City of East Chicago, Ind.*, 799 F.2d 1180, 1185 (7th Cir. 1986). Although leave to amend is usually given freely, it may be restricted where prejudice to a party or delay by a party are involved. *Id.* at 1184. Even if I might have arrived at a different conclusion than the trial judge, that fact does not mean that the trial judge abused his discretion. *Id.* at 1185.

In the instant case, the bankruptcy court indicated that it had difficulty with the timeliness of Ms. Ricca-Stroud's motion to amend. Tr. of 9/8/95, at 18, 25. Furthermore, the court seemed

to indicate that Dr. Lopez would be prejudiced by the extra time and effort that would be necessary in order to answer the additional claim which Ms. Ricca-Stroud sought to include in her complaint. *Id.* at 13, 18. Though it would have been preferable for the court to articulate its reasoning on this issue with greater clarity, the procedural history of this case does support the court's decision to deny the motion.

Ms. Ricca-Stroud originally filed her complaint on June 9, 1994. On August 15, 1994 the bankruptcy court struck two of the claims for failure to plead them with sufficient particularity. In the ensuing year, the parties briefed and argued Dr. Lopez' motion for summary judgment, which ultimately was denied on June 30, 1995. During this time, the parties also engaged in discovery which permitted Ms. Ricca-Stroud to discover the facts she needed to replead her claims. Tr. of 9/8/95, at 17, 21. Yet during this entire time, Ms. Ricca-Stroud failed to move for leave to file an amended complaint. In fact, Ms. Ricca-Stroud waited for two months after the ruling on the summary judgment motion to file her motion for leave, despite the fact that she knew the facts relating to the issue and briefed them in her summary judgment responses. *Id.* at 21-22. In the hearing on this motion for leave, counsel for Ms. Ricca-Stroud merely stated that "I felt that we couldn't amend a complaint until the summary judgment motion was resolved." *Id.* at 22. Not only did counsel fail to offer an explanation for this statement, but even if I accept his statement, the fact remains that the motion was not filed until *two months* after the resolution of the summary judgment motion. Hence, the bankruptcy court did not abuse its discretion in denying the motion to amend the complaint.

Valuation of the Medical Practice

The parties have spilled much ink on the proper method by which Dr. Lopez' medical practice corporation should have been valued on his bankruptcy schedules. Dr. Lopez argues that the cost approach, which measures the liquidation value of the practice, is most appropriate because the practice would be liquidated and not sold as a going concern. Therefore, he claims

that he did not make a false oath in swearing to that value in his schedules. In contrast, Ms. Ricca-Stroud contends that the practice should be valued as a going concern based on the income streams that had been generated in the past and that could be generated in the future. The bankruptcy court found Dr. Lopez' valuation method to be acceptable; therefore, he had not made a false oath. Without further factual development on this point, however, I cannot decide this issue.

During the pendency of this appeal, the Seventh Circuit decided *In re Prince*, 85 F.3d 314 (7th Cir. 1996). *Prince* involved a physician and his wife who had filed for bankruptcy under Chapter 11 and had proposed that their estate be liquidated as part of the plan of reorganization.[1] As part of this plan, Dr. Prince was to retain his medical practice corporation, and he agreed to pay the equity value of it into a fund for the creditors of the estate. *Id.* at 316. Dr. Prince claimed that the equity value of the corporation was $7,500 based on the value of the physical assets. *Id.* The creditors committee's expert, however, placed the value of the corporation at $650,000 based on the value of Dr. Prince's goodwill and the capitalization of the cash flow likely to be generated from the corporation in the future. *Id.* at 317. The bankruptcy court accepted Dr. Prince's valuation, but the district court reversed, holding that the value of goodwill must be included in the calculation. The Seventh Circuit affirmed the district court. *Id.* at 325.

In reaching its conclusion, the Seventh Circuit explained that liquidation value is appropriate only in those cases where a business is dissolving and it would not be appropriate where a business was expected to continue as a going concern. *Id.* at 320. The court further found that despite the lack of a non-compete

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[1] Although *Prince* involved a Chapter 11 bankruptcy, and the case at bar is a Chapter 7 bankruptcy, that fact does not make *Prince* inapplicable. Both cases involve a plan of liquidation, and the analysis used by the Seventh Circuit concerning valuation is applicable regardless of the type of bankruptcy.

agreement between Dr. Prince and his medical corporation, the $7,500 liquidation value could not be used. On this point, the court stated:

> The bankruptcy court's task was not to determine the present value of the stock as of some hypothetical future day when Dr. Prince left to compete with his own corporation, but to determine the value of the stock on the day the bankruptcy reorganization plan was confirmed. Present value is derived by discounting back a projected stream of future cash flows, and this stream of cash flow projections is based on the probability of possible future events. . . . [Dr. Prince's leaving] was a possible event that affected the value of the stock: the higher the probability of him competing, the lower the expected future cash flows to the stock. . . . [T]he mere possibility that he might leave to compete with the corporation does not render the stock worthless any more than the possibility of fire destroying an uninsured house strips that house of every cent of its present value. What is important. . . is the probability of a particular future event occurring. *Id.* at 321. In the instant case, the status of Dr. Lopez' medical corporation as a going concern and the probability of Dr. Lopez leaving to compete with his own practice remain issues which need further development and clarification.

The bankruptcy court's decision to accept liquidation value as an adequate calculation of Dr. Lopez' medical corporation was based largely on the court's conclusion that the corporation could not be a going concern if Dr. Lopez left to compete. Tr. of 10/18/95, at 547-48, 550. Yet as *Prince* makes clear, the possibility of Dr. Lopez leaving was just a factor to consider when calculating the future cash flows of the corporation. Whether or not he could or, in fact, would leave cannot be conclusive on the status of the corporation as a going concern. Hence, the bankruptcy court's task upon remand is twofold. First, it must decide whether Dr. Lopez' medical corporation could continue as a going concern. Second, if the corporation could continue as a going concern, it must determine what the present value of the stock would be given the probability of any

future events and their impact on the value of the stock. If the second inquiry is necessary, I would commend to the bankruptcy court, in addition to any testimonial evidence or expert reports, the valuation method that was outlined in *Prince*. 85 F.3d at 319-324.[2]

Reliance on Agents in Preparing Schedules

Ms. Ricca-Stroud's third, fourth, and fifth grounds for reversal all may be addressed as a group. Each of the claims essentially relates to the question of whether or not Dr. Lopez made a false oath on his bankruptcy schedules by virtue of the fact that he relied on an agent to prepare them. The bankruptcy court found Dr. Lopez to be a credible witness concerning this matter, and the court did not find him to be reckless by accepting and signing for the valuations made by his agents. Tr. of 10/18/95, at 549. Ms. Ricca-Stroud argues, however, that these findings were in error because Dr. Lopez stated that he did not agree with the valuations, and a debtor simply cannot rely on the representations made by his agents when signing bankruptcy schedules.

This Court reviews factual findings of the bankruptcy court for clear error, and deference will be given to findings relating to credibility. *In re Lifschultz Fast Freight*, 191 B.R. 712, 715 (N.D. Ill. 1996). I find no clear error in the bankruptcy court's factual findings on these issues. Contrary to Ms. Ricca-Stroud's contentions, Dr. Lopez may not have known whether any of his

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[2] Even if the bankruptcy court subsequently determines that Dr. Lopez' valuation method was incorrect, that finding does not necessitate a finding that Dr. Lopez also made a false oath on his bankruptcy schedules. Much like Dr. Prince, Dr. Lopez genuinely may have believed that his liquidation valuation was appropriate considering that fact that he did not intend to remain in the employ of his corporation after it was sold. However, if the facts demonstrate that Dr. Lopez intended to continue to work for or operate the corporation as a going concern, then the veracity of his oath may be in doubt. In any event, the valuation of that corporation is relevant to the amount of assets available to Dr. Lopez' creditors.

assets were undervalued on the schedules. According to his testimony, Dr. Lopez had no experience with appraising or valuing real estate and had no basis upon which to dispute the appraisals that had been done for this case. Tr. of 10/18/95, at 394-95, 397. Although Dr. Lopez may have stated that he did not agree with all of the amounts listed by his agent, Mr. Schindler, in the schedules, *Id.* at 319, 322, Dr. Lopez is not an accountant, real-estate appraiser or financial analyst. Dr. Lopez is a physician. He lacks the basic knowledge, let alone expertise, necessary to dispute the calculations. Hence, the record supports the bankruptcy court's factual findings and credibility determination with regard to the truthfulness of Dr. Lopez' oaths and his lack of reckless intent.

Furthermore, case law supports this conclusion. If a false statement is made on a bankruptcy schedule, a discharge will not be denied where that false statement is the result of mistake or inadvertence. *See North Community Bank v. Boumenot*, 106 B.R. 149, 152 (N.D.Ill.1989). Rather, a discharge will be denied on this basis only "when the cumulative effect of all falsehoods together evince a pattern of reckless and cavalier disregard for the truth." *In re Montgomery*, 86 B.R. 948, 957 (Bankr. N.D. Ind. 1988), *rev'd on other grounds*, *In re Walters*, 176 B.R. 835, 875 (Bankr. N.D. Ind. 1994); *see also In re Bobroff*, 58 B.R. 950, 953 (Bankr. E.D. Pa. 1986). In this case, no such pattern is apparent on the basis of the record. Dr. Lopez did leave one of his assets, a real estate investment trust worth approximately $2,000, off of his schedule. He claimed that he had forgotten about this asset and that as soon as his office manager reminded him, he directed her to tell Mr. Schindler who reported the asset to the bankruptcy trustee. On this basis, and I hardly find any room for disagreement, the bankruptcy court, by granting the discharge, concluded that this omission was not made knowingly or fraudulently.

With respect to the valuation of Dr. Lopez' property located in Chicago Ridge, Illinois, I also find no basis on which to disturb the bankruptcy court's determination of no reckless intent. Ms. Ricca-Stroud merely claims that because Dr. Lopez' believed

this property to be worth more than the amount for which it was scheduled, his belief establishes that the property was in fact worth that amount. Yet she fails to note that Dr. Lopez also testified that independent appraisals of the property had revealed to him that the property was worth significantly less than what he believed it to be worth. Tr. of 10/18/95, at 395. Even if she had presented some other evidence tending to show that Dr. Lopez knew that the property was worth more than the scheduled amount, the Court is not clear that such evidence would rise to the level of a pattern of "reckless and cavalier disregard for the truth" that would require reversal.[3] Therefore, based on the evidence that actually was presented to the bankruptcy court, I find no clear error in the factual findings.

Use of Document Not in Evidence

In questioning a witness and in issuing his decision, the bankruptcy judge referred to a consulting services practice aid from the American Institute of Certified Public Accountants. Tr. of 10/18/95, at 78-82, 546-48. It is not clear to this Court exactly what purpose the document served. The bankruptcy judge appears to have used the document only for reference and to make some general comments on the methodology of valuing Dr. Lopez' medical corporation. Because I have remanded the case for further factual development on the issue of the valuation of the medical corporation, I need not reach the propriety of the judge's references to this document. Nevertheless, I would caution the bankruptcy judge not to refer to documents that are not in evidence in the case.

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[3] Although Ms. Ricca-Stroud has argued that several other statements made by Dr. Lopez were false and thereby establish this pattern of recklessness, those statements all have to do with the valuation of the medical corporation. That issue has been addressed earlier in this opinion. Whether any of those statements were false and were made knowingly will have to be determined based upon the additional facts to be developed by the bankruptcy court upon remand.

Conclusion

For the foregoing reasons, the bankruptcy court's order denying the plaintiff's motion to amend her complaint is affirmed. As to her remaining five bases for error, all of them are without merit except for the issue relating to valuation of the medical corporation. On that issue, I find that further development of the factual record is necessary. Therefore, this case is remanded to the bankruptcy court for further proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS

Name of Assigned Judge or Magistrate Judge	Elaine E. Bucklo	Sitting Judge if Other Than Assigned Judge	
Case Number	95 C 7189	Date	December 9, 1996
Case Title	Ricca-Stroud Vs. Lopez		

* * * *

ORDER

The defendant, Dr. Francisco Lopez, has moved this Court for rehearing of its October 18, 1996 memorandum opinion and order in which the Court, *inter alia*, remanded this case back to the bankruptcy court for additional factual developments on the status of Dr. Lopez' medical practice as a going concern and the valuation of that practice. The Court's holding on this point was influenced largely by the decision in *In Re Prince*, 85 F.3d 314 (7th Cir. 1996). Dr. Lopez has argued that *Prince* is factually and legally distinguishable from this case and that a remand would adduce no relevant new evidence. I disagree.

Although *Prince* involved a Chapter 11 bankruptcy, and the instant case involves a Chapter 7 bankruptcy, that fact alone does not distinguish the two cases. Dr. Lopez' argument confuses the difference between method and application. *Prince* offers the proper method to use to valuate a medical practice, and that method can be employed in different types of bankruptcy cases. The application of that method, however, can be limited to the specific factual setting of *Prince*, a Chapter 11 bankruptcy. The Court's order of remand instructed the bankruptcy court to consider the method of valuation outlined in *Prince*; it did not

instruct the bankruptcy court to apply that valuation in the same manner.

Instead, the Court would like to see further factual development of the record on several points. First, the bankruptcy court should determine if Dr. Lopez could continue as a going concern, regardless of whether or not Dr. Lopez would leave his medical practice and compete with it. If the court answers that question in the affirmative, it should proceed to value Dr. Lopez' stock in medical corporation according to the method outlined in *Prince*. *See* 85 F.3d at 319-24.

Furthermore, the additional evidence and new valuation *could* be relevant to the issue of Dr. Lopez' intent. As the Court states in its earlier order, a finding by the bankruptcy court upon remand that Dr. Lopez' valuation was incorrect would not necessarily mean that Dr. Lopez made a false oath on his schedules. *See* Memo. Op. and Order at 7 n.2. Additional evidence concerning Dr. Lopez' future employment status with his medical corporation might reveal his intent more clearly with respect to his oath and valuations. The current factual record lacks any detailed ex-planation from Dr. Lopez concerning this issue. That record only contains his assertion that he would not continue to work for his medical corporation if it were sold. No examination was conducted regarding Dr. Lopez' reasons for this statement, unlike his statements concerning the value of property in Chicago Ridge or the omission of his real estate investment trust from his schedules. *See* Tr. of 10/18/95 at 395, 402, 502.

On the basis of the current factual record, the Court was not and still is not able to determine whether or not Dr. Lopez acted with fraudulent intent when he signed his bankruptcy schedules with respect to the valuation of his medical practice. For this Court, the *Prince* case highlighted the area of the record where deficiencies exist. The purpose of the remand is to cure those

deficiencies through the development of additional facts which will enable the Court to review this issue appropriately.

ENTER ORDER:

/s/ Elaine E. Bucklo
Elaine E. Bucklo
United States District Judge

Dated: December 9, 1996

[filed Oct. 19, 1995]

UNITED STATES BANKRUPTCY COURT,
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable Thomas James

Cause No. 94 A 1056 Date October 18, 1995

Title of Cause	Gay C. Ricca-Stroud v. Francisco Lopez
Brief Statement of Motion	The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).
Names and Addresses of moving counsel Representing Names and Addresses of other counsel entitled to notice and names of parties they represent.	The court has held a trial on the complaint of Gay C. Ricca-Stroud, plaintiff, against Francisco Lopez, defendant, objecting to the debtor's discharge. For the reasons stated in open court on October 18, 1995, the court finds and concludes that judgment is to be entered in favor of Francisco Lopez, defendant, against Gay C. Ricca-Stroud, plaintiff, the discharge of Francisco Lopez, debtor, issued and the complaint dismissed. Judgment entered in favor of Francisco Lopez, defendant, against Gay C. Ricca-Stroud, plaintiff. Case dismissed with costs. Discharge of Francisco Lopez, debtor, shall issue.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FRANCISCO LOPEZ,	)	
	)	No. 93 B 23445
	)	
Debtor.	)	
	)	
GAY C. RICCA-STROUD,	)	
	)	No. 94 A 1056
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
FRANCISCO LOPEZ,	)	
	)	
Defendant.	)	

October 18, 1995
2:00 o'clock pm.

TRANSCRIPT OF PROCEEDINGS

BEFORE: THE HONORABLE THOMAS JAMES
APPEARANCES:

MR. RICHARD C. LENG
MR. RALPH J. SCHINDLER
on behalf of Francisco Lopez;

MR. JAMES K. KENNY
MR. ROBERT E. KENNY, JR.
on behalf of Gay C. Ricca-Stroud.

[544] * * * *

THE COURT . . . . Ms. Gay C. Ricca-Stroud has objected to the [545] discharge of Francis Lopez, Dr. Francis Lopez I should say, the defendant in two respects.

In 727 of the Bankruptcy Code, it is stated that "The court shall grant the debtor," Dr. Lopez, "a discharge, unless the debtor," Dr. Lopez, "with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, or mutilated, or concealed or has permitted to be transferred, removed, destroyed, mutilated, or concealed property of the debtor within one year before the date of the filing of the petition."

This section goes on to state that "The court shall grant the debtor a discharge unless the debtor," Dr. Lopez, "knowingly and fraudulently in or in connection with the case made a false oath or account."

The Court is satisfied from its review of the evidence and the cases that have been cited that the objections will be overruled and Dr. Lopez granted a discharge.

The more difficult problem faces the Court in determining whether Dr. Lopez knowingly and fraudulently in or in connection with the case made a false oath or account. As to that provision and the interest in MLH Realty, the Court notes that Dr. Lopez and [546] his lawyer, at the place of the First Meeting Of Creditors, prior to the First Meeting Of Creditors, informed the trustee that there was, indeed, these interests of Dr. Lopez in MLH Realty. The trustee and any creditor present at the meeting were then made aware officially in the proceedings that there were these interests. Indeed, the trustee sold these interests.

Even though I cannot find or the Court cannot find from this that Dr. Lopez knowingly and fraudulently made a false oath as to these interests in MLH Realty, the Court cannot find that Dr. Lopez with intent to hinder, delay, or defraud a creditor concealed these items from creditors so that they would not be

able to take advantage of those assets in the administration of the case so that the asset could be sold and applied, after I suppose all the reasonable expenses, to the payment of creditors. Therefore, the Court concludes that the objection to the nonlisting or the alleged concealment of MLH Realty must fail. As I have stated, the charges as to Dr. Lopez knowingly and fraudulently making other false oaths must also fail.

As has been stated in the American Institute of Certified Public Accountants Consulting Services practice Aid 93-3 involving small business consulting conducting a valuation of a closely held [547] business at page — I gather it's Section 13-100-2, maybe it's Page 13, 105.06: "The practitioner," meaning the CPA, "should be aware that valuation is both an art and a science and, therefore, absolute precision will never be achieved. During the valuation process, certain information will be readily available and unquestionable. Other information will require the valuer to use informed judgment and common sense."

At this juncture, it is not necessary for the Court to determine what is the value of the shares of the stock in Cardiology Internal Medical Associates, S.C. Cardiology Internal is an Illinois Medical Corporation; it is licensed to practice medicine.

It is apparent to the Court that a willing buyer of Cardiology Internal would have to be physician who had a subspeciality in cardiology. It is also apparent to the Court that this willing buyer, the physician with a subspeciality in cardiology, would also want Dr. Lopez to agree to employment for a period of time, a transitional period, so that this willing buyer could work into the practice and accept or take over the patients of Dr. Lopez.

It is unrealistic in the Court's mind to call this Cardiology Internal a going concern where the operations of the company depend on the one physician who [548] does have the affiliations and the contacts to get the patients to bring in the income that is there.

It has not been established to the Court's satisfaction that the lab work was really a source of income independent of the

workings of Dr. Lopez as a physician. Without him, there would be no lab work. The Court is most impressed by the fact that this is a professional corporation from which Dr. Lopez could walk away.

The Court notes in this Consulting Services Practice Aid that many of these instances — many of the examples or the features is to discuss what is a taxable basis. And as Ms. Zimmerman stated, that going concern — in her analysis of going concern, it seemed apparent to the Court that it would be a going concern if, in some way, Dr. Lopez were to be a part of the continuing operation so that, as I said, this physician who had a subspeciality in cardiology could work into the patient list that Dr. Lopez has.

It is impossible for this Court to say that any such valuation is such that there was a false valuation, and it had to be shown by a preponderance of the evidence that there was, indeed, a false valuation or a false oath made. The Court finds that there was no false oath made as to the value of these shares of stock.

[549] It is reasonable for the Court to accept Ms. Zimmerman's valuation. If the debtor had chosen that, maybe the trustee would have gotten a million dollars for these shares of stock. Maybe the trustee would not. It's as easy for the Court to accept the valuation of $2,000 for these shares of stock; therefore, the Court cannot say definitively that the value is such and that the value used was a false claim or a false oath in the schedules.

The Court also feels that it has not been established that Dr. Lopez knowingly and fraudulently made any false oath or account. The Court is satisfied that Dr. Lopez is a credible witness who left the details of his business, and I don't find that this was reckless conduct on behalf of Dr. Lopez to his staff and to his lawyers to make these valuations that he accepted and signed for.

The issues as to Household Furnishings do not rise to a false oath or account. And these were disclosed, as I think the Latorre case has been cited before, 164 Bankruptcy Reports 692, a case

decided in 1994 in the Bankruptcy Court of the Middle District of Florida, fully supports the analysis that the Court has made. Here in this case, a chiropractic practice, the judge, Judge Paskay said that, "The value of the stock depends in large measure on the individual who is rendering the services [550] and the loyalty of the patients to the individual."

The Court has suggested that the value of Cardiology Internal depends on Dr. Lopez who is rendering the services. It has been established to the Court that his patients are loyal to Dr. Lopez. This is a factor of importance on the value of accounts receivable and on the other business of Cardiology Internal.

The Court agrees with Judge Paskay that a debtor's assessment of value is no more than an educated guess on the information available to the debtor at the time, and is merely an expression of the debtor's belief concerning a matter not susceptible of exact knowledge.

The Court notes that the trustee, in seeing and looking over this asset, may, in order to test the value, can, and perhaps should, and I gather may be doing so, attempt to sell the stock in this corporation, Cardiology Internal, to obtain the value of the Cardiology Internal stock.

For these reasons, the Court will enter a judgment in favor of the defendant and against the plaintiffs with costs and dismiss the complaint.

* * * *

RELEVANT STATUTORY PROVISION

28 U.S.C. § 158. Appeals (1990)

(a) The district courts of the United States shall have jurisdiction to hear appeals from final judgements, orders, and decrees, and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

(b)(1) The judicial council of a circuit may establish a bankruptcy appellate panel, comprised of bankruptcy judges from districts within the circuit to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section.

(2) If authorized by the Judicial Conference of the United States, the judicial councils of 2 or more circuits may establish a joint bankruptcy appellate panel comprised of bankruptcy judges from the districts within the circuits for which such panel is established, to hear and determine, upon consent of all the parties, appeals under subsection (a) of this section.

(3) No appeal may be referred to a panel under this subsection unless the district judges for the district, by majority vote, authorize such referral of appeals originating within the district.

(4) A panel established under this section shall consist of three bankruptcy judges, provided a bankruptcy judge may not hear an appeal originating within a district for which the judge is appointed or designated under section 152 of this title.

(c) An appeal under subsections (a) and (b) of this section shall be taken in the same manner as appeals in civil proceedings gener- ally are taken to the courts of appeals from the district courts and in the times provided by Rule 8002 of the Bankruptcy Rules.

(d) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgements, orders and decrees entered under subsections (a) and (b) of this section.

28 U.S.C § 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

(2)

No. 97-537

Supreme Court, U.S.
FILED
OCT 27 1997
CLERK

IN THE

Supreme Court of the United States

October Term, 1997

FRANCISCO LOPEZ,

Petitioner,

v.

GAY C. RICCA-STROUD,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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19pp

QUESTION PRESENTED

Does 28 U.S.C. §158(d) provide the court of appeals with subject matter jurisdiction to review a non-final order of the district court sitting as a court of appeals in a bankruptcy case?

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BRIEF IN OPPOSITION

The respondent Gay C. Ricca-Stroud ("Mrs. Ricca-Stroud"), a creditor of the estate of the debtor Francisco Lopez ("Dr. Lopez"), respectfully submits this brief in opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit (the "Petition").

OPINIONS BELOW

The court of appeals' decision is reported at 116 F.3d 1191 and is reprinted in the appendix to the Petition. (Pet. App. 1a). The district court's opinion is reported at 201 B.R. 943 and is reprinted in the appendix to the Petition. (Pet. App. 7a). The district court's order denying rehearing is unreported and is set forth in the petitioner's appendix. (Pet. App. 16a). The proceedings in the bankruptcy court are unreported. The bankruptcy court's order granting discharge and a transcript of the oral opinion of the bankruptcy court are set forth in the appendix to the Petition. (Pet. App. 19a, 20a).

STATUTORY PROVISIONS

In addition to 28 U.S.C. §158(d) and §1291 which are set forth in the petitioner's appendix (pet. app. 25a, 26a), 28 U.S.C. §1292 and 28 U.S.C §2072 are set forth in respondent's appendix. Resp. App. 1a, 4a.

STATEMENT OF THE CASE

In June of 1994 the respondent, Gay Ricca-Stroud, filed her four-count adversary complaint

against the petitioner, Dr. Francisco Lopez, seeking a denial of discharge under §727 of the Bankruptcy Code. 11 U.S.C. §727 (1994). Mrs. Ricca-Stroud alleged that Dr. Lopez fraudulently understated the market value of certain assets identified on his bankruptcy schedules, including certain condominiums located in Acapulco, Mexico, a medical complex located in Chicago Ridge, Illinois, and his 100% ownership interest in Cardiology and Internal Medicine Associates, S.C., a medical corporation employing Dr. Lopez and other physicians and carrying on other business related to the practice of medicine. Mrs. Ricca-Stroud also alleged the failure to schedule a certain real estate investment trust as a separate ground for the denial of discharge.

Dr. Lopez scheduled the value of the medical corporation as $500, and, due to its low value, claimed it as exempt from the creditors. At all times throughout the bankruptcy proceedings and thereafter, Dr. Lopez continued to operate the medical corporation[1] as he had done prior to filing.

The bankruptcy court struck the counts related to the Acapulco condominiums and the medical complex for failure to state fraud with sufficient particularity. After discovery and extensive briefing, the bankruptcy court denied Dr. Lopez's motion for summary judgment as to the entire adversary com-

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[1] Subsequent to its judgment on the adversary complaint, the bankruptcy court ordered the bankruptcy trustee to abandon the medical corporation to Dr. Lopez, despite Mrs. Ricca-Stroud's bid of $25,000 for the interest in the corporation. This abandonment is the subject of a second appeal currently pending in the District Court for the Northern District of Illinois, No. 96 CV 4969.

plaint. The bankruptcy court denied Mrs. Ricca-Stroud leave to amend her complaint to restate one of the stricken counts and to include a new count. The case went to trial on the remaining counts. The bankruptcy court rendered judgment for Dr. Lopez in October of 1995 and Mrs. Ricca-Stroud appealed.

The appeal to the district court was not a single issue appeal as the Petition might lead the Court to infer. The following issues were presented as error: (1) the denial of Mrs. Ricca-Stroud's motion to amend her complaint; (2) the bankruptcy court's finding that the $500 valuation of the medical corporation was not a false oath; (3) the bankruptcy court's ruling that Dr. Lopez was not accountable for the truthfulness of his oath because he relied on his attorney to prepare his petition; (4) the bankruptcy court's ruling that Dr. Lopez did not make a false oath where he relied on third parties to value his assets, even though he did not believe some of the valuations; (5) the bankruptcy court's finding that the evidence did not demonstrate reckless intent tantamount to fraud in violation of §727 of the Bankruptcy Code; and, (6) the bankruptcy court's extra-judicial factual investigation made during the course of trial. Pet. App. 7a-8a.

The district court affirmed the denial of the motion to amend the complaint, unable to find an abuse of discretion. The court found that Mrs. Ricca-Stroud's contentions regarding the principal's liability for the acts of agents and attorneys were without merit. Without affirming or reversing, the district court remanded the case to the bankruptcy court for further factual development regarding Dr. Lopez's fraudulent intent and the proper method of valua-

tion with reference to *In re Prince*, 85 F.3d 314 (7th Cir. 1996), *cert. denied*, 117 S.Ct. 608 (1996).

The district court's ruling on the petitioner's motion for rehearing clearly establishes that the court did not dispositively reach the issue of intent. The district court wrote, "[o]n the basis of the current factual record, the Court was not and still is not able to determine whether or not Dr. Lopez acted with fraudulent intent when he signed his bankruptcy schedules with respect to the valuation of his medical practice." Pet. App. 17a. The court specifically remanded the matter to the bankruptcy court to receive evidence related to the petitioner's intent. *Id.*

The district court expressly did not address all the evidentiary issues tending to demonstrate the petitioner's culpable intent. The district court noted that these issues were closely related to the remand previously ordered, and thus the bankruptcy court must examine them in light of the record upon remand.[2] Pet. App. 14a., n. 3. For similar reasons, the district court did not address the bankruptcy court's use of extra-judicial evidence in ruling.[3] *Id.*

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[2] The court stated, "[a]lthough Ms. Ricca-Stroud has argued that several other statements made by Dr. Lopez were false and thereby establish this pattern of recklessness, those statements all have to do with the valuation of the medical corporation. That issue has been addressed earlier in this opinion. Whether any of those statements were false and were made knowingly will have to be determined based upon the additional facts to be developed by the bankruptcy court upon remand." Pet. App. 14a., n. 3.

[3] The court stated, "[b]ecause I have remanded the case for further factual development on the issue of the valuation of

The petitioner incorrectly states that the bankruptcy court found as fact that Dr. Lopez would not continue to work for the medical corporation. (Pet. 3-4). This finding does not appear in the bankruptcy court's judgment. The Petition additionally misstates that Mrs. Ricca-Stroud did not raise her inability to adequately cross examine Dr. Lopez's experts at trial. (Pet. 5, 6). In her pleadings before the district court, Mrs. Ricca-Stroud explicitly claimed as error that the bankruptcy court refused to fully permit her cross-examination of the petitioner's attorney who claimed responsibility for the valuations on the schedules.[4]

On appeal to the Seventh Circuit Court of Appeals the court dismissed the petitioner's appeal for want of appellate jurisdiction. The court applied the

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the medical corporation, I need not reach the propriety of the judge's references to this document. Nevertheless, I would caution the bankruptcy judge not to refer to documents that are not in evidence in the case." Pet. App. 14a., n. 3.

[4] Throughout the trial, the petitioner was portrayed as so unsophisticated that he could not know whether his company was worth $500 or over $1 million. The responsibility for the truth of the bankruptcy petition was therefore delegated to his attorney. In addition to representing the petitioner in the bankruptcy court, the petitioner's attorney testified as an expert witness on behalf of the petitioner. However, during the course of cross-examination, the bankruptcy court limited the respondent's examination, interjecting, "Mr. Schindler is not on trial, sir. This is the debtor who is on trial. The debtor states at the bottom of his schedules that he declares these statements to be true under penalty of perjury. And I think you are not attacking this problem with Mr. Schindler in a way that the Court could hold the debtor responsible for these statements." (Tr. 213-214).

majority rule as identified in the Petition. Chief Judge Posner stated:

> This is not such a case [where the proceeding on remand is not likely to generate further appeals]. The issue is whether the debtor fraudulently undervalued his assets and so should be denied a discharge of his debts. The purpose of the remand ordered by the district court is to determine the value of the debtor's principal asset under principles set forth in a recent decision by this court, *In re Prince*, 85 F.3d 314 (7th Cir. 1996), because whether the debtor did undervalue his assets, and if so by how much, is important to the issue of fraudulent undervaluation, though not necessarily conclusive. It is apparent that such a remand is not ministerial, and therefore we have no appellate jurisdiction if we adhere to *Riggsby* and the cases following it.

Pet. App. 2a. The court of appeals rejected the minority approach finding that the term "final" in §158(d) is not "a term of art meaning 'final or non final'" but "requires meaningful finality, albeit finality of the proceeding embedded in the overall bankruptcy case rather than of the bankruptcy case itself." Pet. App. 5a. The court additionally examined the "compelling practical objections" to the minority view. *Id.* Accordingly, the court dismissed the appeal.

REASONS FOR DENYING THE WRIT

I. The Court need not decide the appeal since §1292 already operates to confer jurisdiction in cases where a disputed issue of law exists and an interlocutory appeal would materially advance the ultimate disposition of the litigation.

The Court need not address the merits of the majority approach or the minority approach to appellate jurisdiction in bankruptcy cases, since the goals to be achieved by either approach are presently attainable under the statutory scheme embodied in 28 U.S.C. §158(d) and 28 U.S.C. §1292(b). Thus there is no merit in the Petitioner's claim that the Court must resolve the split among the circuits identified in the opinion below. Pet. App. 1a, *et seq.*

This Court has found that like §1291, §158(d) does not confer appellate jurisdiction over interlocutory orders of the district court sitting as a court of appeals in bankruptcy. *Connecticut National Bank v. Germain*, 503 U.S. 249, 252 (1992) (parties must agree that §158 does not confer jurisdiction on the court of appeals over interlocutory orders). However, §1292 is operative in bankruptcy cases in the same manner as in ordinary civil litigation. *Id.* at 254. While *Germain* may not be wholly dispositive of the issue presented in the Petition, it is instructive on the interaction among the several statutes addressing appellate jurisdiction.

Germain has been acknowledged by the minority courts as casting doubt on the continued validity of the various minority approaches to appellate juris-

diction in bankruptcy matters. *See e.g., Stanley v. Crossland, Crossland, Chambers, MacArthur & Lastreto (In re Lakeshore Village Resort, Ltd.)*, 81 F.3d 103, 105 (9th Cir. 1996). The majority-view appellate courts have found *Germain* to fortify the traditional application of finality principles to bankruptcy appeals. *Quiros Lopez v. Unanue Casal (In re Unanue Casal)*, 998 F.2d 28 (1st Cir. 1993).

In *Unanue Casal* the First Circuit held that "jurisdiction to review a district court appellate order in a bankruptcy case derives from either of two statutory sources: (1) the bankruptcy appeal provisions of...§158(d); or (2) the interlocutory appeal provisions in...§1292 applicable to civil actions generally." *Id.* at 31 (*citing Germain*). The case clearly applied the majority rule concerning appellate review of final bankruptcy orders.[5] The court found that §158(d) demands a final order, although the accepted exceptions to finality, such as the collateral order doctrine, could apply.[6] *Id.* The court

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[5] The court firmly held that "[a]ccordingly, a district court order in an adversary proceeding is not appealable as of right under section 158 (d) unless it ends the entire proceeding 'on the merits and leaves nothing for the court to do but enter the judgment.' *See Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 37, 375 (1987) (*quoting Caitlin v. United States*, 324 U.S. 229, 233 (1945))." *Id.*

[6] *Lockwood v. Snookies, Inc. (In re F.D.R. Hickory House, Inc.)*, 60 F.3d 724, 726-7 (11th Cir. 1995), identifies three exceptions to the finality rule: (1) the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541 (1949); (2) the doctrine of practical finality of *Forgay v. Conrad*, 47 U.S. (6 How.) 201 (1848); and (3) the "most extreme" exception for review in marginally final cases bearing on fundamental issues pertinent to the further conduct of the

additionally found that although an interlocutory appeal pursuant to §1292(b) would otherwise be an option in the case, the court could not entertain such an interlocutory appeal since the appellant failed to obtain the necessary certification and comply with the 10-day jurisdictional time period. *Id.* at 32, 33.

The purpose of §1292(b) is stated clearly in its text: in matters where there is a "controlling question of law as to which there is substantial ground for difference of opinion and...an immediate appeal from the order may materially advance the ultimate termination of the litigation," jurisdiction will vest in the appellate court. 28 U.S.C. §1292(b).

The petitioner argues for jurisdiction asserting that the district court erred on a matter of law so dispositive that a decision by the appellate court "would quickly and efficiently wrap up a bankruptcy proceeding." Pet. 8. This argument is based on the presumption that he is correct on the underlying merits of the substantive case. According to his argument, jurisdiction would lie under §158(d) if the court of appeals would rule in his favor; yet there would be no jurisdiction if that court would find in favor of the respondent because the case would not, after all, be totally resolved. The parties therefore would be required to expend all of the time, cost, and effort of presenting a case on the merits to the court of appeals, and the court would have to decide

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case, identified in *Gillespie v. United States Steel Corporation*, 379 U.S. 148 (1964).

the merits of the case *before* determining jurisdiction. This is a backwards approach to jurisdiction.[7]

Even if it were true that the resolution of a single legal issue would definitively advance the resolution of the case *sub judice*, it not necessary for this Court to resolve the divergent approaches to the question of finality under §158(d), since §1292(b) clearly supplies the route for the appeal desired by the petitioner. If the petitioner's characterization of the case were accurate, then the district court would have likely provided the certification identified in §1292(b). However, the petitioner did not seek certification. He should not be heard to make a strained argument before the court of appeals that an interlocutory order is in reality a final order. In effect, the petitioner seeks §1292(b) review while sidestepping the certification requirement of that section.

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[7] It must be remembered that the district court did not reach all issues raised by Mrs. Ricca-Stroud in her appeal. Upon remand these issues were either to be considered in further detail by the bankruptcy court or possibly become unnecessary to decide (depending upon the resolution of the remand). Thus, the petitioner's supposition, that the determination of a single legal issue would put the case to rest, cannot be taken as correct, since there were other, alternate grounds warranting reversal that were not reached by the district court in the first instance. Similarly, Mrs. Ricca-Stroud should at some point become entitled to take her own appeal to the court of appeals from the adverse rulings of the district court, such as the denial of her motion to amend the adversary complaint. Again, the petitioner's promise that a decision of the court of appeals would have "obviated the need for a remand, resolved all issues regarding Dr. Lopez's assets, and closed the bankruptcy proceedings entirely" is not accurate. Pet. 14.

The district court is the appropriate place to address the merits of the §1292(b) certification. The district court has already extended its efforts in reviewing the common law record, the trial transcripts, the arguments of the parties, the legal precedent governing the dispute, and the judgment of the court below. The court of appeals is exactly the wrong place to address these questions, since to do so basically requires a complete hearing on the merits merely to determine the question of jurisdiction. Section 1292(b) clearly intends to avoid unnecessary waste of judicial resources by demanding that the certification be acquired at the district court level. The petitioner's proposed rule of law runs contrary to the policy to be achieved by §1292(b) since it needlessly consumes scarce judicial resources.

Section 1292(b) jurisdiction is by its terms discretionary in the appellate court. This discretion in reality will permit the courts of appeals from both the majority and minority view courts to exercise jurisdiction according to law and still pursue the needs and policies of their particular circuits. It may be that the majority view courts would decline review of the matter based on their stated policy, while the minority circuits would elect to hear the appeal, intending to achieve their stated goals. Section 1292(b) thus invests the minority view courts with the ability to achieve their stated policies without the need to graft a strained and unwarranted meaning on the plain language of §158(d).

II. The Court need not decide the appeal since §1292(e) supplies rulemaking authority to provide for appellate jurisdiction over interlocutory remand orders like that entered in this case.

The Federal Courts Administration Act of 1992 added subsection (e) to 28 U.S.C. §1292. Pub. L. No. 102-572, 101. Subsection (e) expressly authorizes the Supreme Court to add to the types of interlocutory orders which may be appealed to the Courts of Appeal, which are not otherwise identified in the first four subsections of the law. Additional rulemaking authority can be found in 28 U.S.C. §2072, providing the Court with the ability to define what constitutes a final judgment for the purposes of §1291. To the respondent's knowledge, the Court has not yet exercised its authority pursuant to §1292(e), however, it is respectfully submitted that the Court could readily resolve the disputes among the circuits by exercising its rulemaking authority, thus obviating the need to entertain this appeal.

CONCLUSION

The respondent respectfully prays that the Court deny the Petition for a Writ of Certiorari.

Respectfully submitted:

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United States Code
Title 28. Judiciary and Judicial Procedure
Part IV–Jurisdiction and Venue
Chapter 83–Courts of Appeals

1292. Interlocutory decisions.

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as

to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The court of appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction–

(1) of an appeal from an interlocutory order or decree described in subsection (a) or (b) of this section in any case over which the court would have jurisdiction of an appeal under section 1295 of this title; and

(2) of an appeal from a judgment in a civil action for patent infringement which would otherwise be appealable to the United States Court of Appeals for the Federal Circuit and is final except for an accounting.

(d) (1) When the chief judge of the Court of International Trade issues an order under the provisions of section 256(b) of this title, or when any judge of the Court of International Trade, in issuing any other interlocutory order, includes in the order a

statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

* * * * *

(e) The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d).

United States Code
Title 28. Judiciary and Judicial Procedure
Part V--Procedure
Chapter 131--Rules of Courts

2072. Rules of procedure and evidence; power to prescribe.

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

(3)

Supreme Court, U.S.
FILED
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No. 97-537

IN THE
Supreme Court of the United States

OCTOBER TERM, 1997

FRANCISCO LOPEZ,

Petitioner,

v.

GAY C. RICCA-STROUD,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY OF THE PETITIONER

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REPLY OF THE PETITIONER

1. Respondent does not dispute that the courts of appeals are in conflict concerning the appealability of a district court decision remanding a final decision of a bankruptcy court. Respondent also does not dispute that Petitioner accurately described this "jurisdictional quagmire"[1] and that this issue is recurring. Since the Petition was filed, the Sixth Circuit decided *Millers Cove Energy Co. v. Moore* (*In re Millers Cove Energy Co.*), No. 96-6400, 1997 WL 654252 (6th Cir. Oct. 23, 1997), which reiterates that Circuit's commitment to the position adopted in *SEOR, Inc. v. Textron Oil Corp.* (*In re Frederick Petroleum Corp.*), 912 F.2d 850 (6th Cir. 1990).

2. Respondent also does not seriously dispute Petitioner's showing that the minority rule circuits would have held that the district court's decision below was final and thus would have asserted jurisdiction.[2] Instead, many of Respondent's arguments are addressed to the majority approach's purported comparative virtues. For example, she asserts that, under the minority standard, jurisdiction turns on a determination of the merits. Opp. at 9-10. But just because the minority courts may determine their jurisdiction by looking to whether the legal issues presented are potentially dispositive, they need not first resolve those issues.[3]

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[1] Preston T. Towber, *A Uniform Approach to Determining Finality in Bankruptcy Appeals Under 28 U.S.C. Section 158(d)*, 29 S. Tex. L. Rev. 587, 588 (1988).

[2] Respondent asserts that there are outstanding issues other than the one that Petitioner seeks to appeal: his intent in valuing his medical practice. *See* Opp. at 4 & n.3, 10 n.7. So, she says, Petitioner's appeal would not be potentially dispositive. But the district court found that "all of [Respondent's assignments of error] are without merit except for the issue relating to valuation of the medical corporation." Pet. App. 15a. This Petition thus presents a model case for determining the proper finality standard.

[3] *Bonner Mall Partnership v. U.S. Bancorp Mortgage Co.* (*In re Bonner Mall Partnership*), 2 F.3d 899, 904 n.13 (9th Cir. 1993), *cert. dismissed*, 513 U.S. 18 (1994).

3. Respondent primarily opposes certiorari on three grounds: (1) this Court's five-year-old decision in *Connecticut National Bank v. Germain*, 503 U.S. 249 (1992), may resolve the circuit split; (2) Petitioner could have sought a permissive interlocutory appeal under 28 U.S.C. § 1292(b); and (3) the Court can resolve this conflict by its rulemaking authority under 28 U.S.C. §§ 1292(e) and 2072(c). None supports denying certiorari.

4. Contrary to Respondent's claim, this Court's decision in *Germain* does not "cast[ ] doubt on the continued validity of the various minority approaches to appellate jurisdiction in bankruptcy matters." Opp. at 7-8. In *Germain*, this Court held that 28 U.S.C. § 1292(b) permits interlocutory appeals in bankruptcy cases;[4] this Court did not address the finality standard under 28 U.S.C. § 158(d). Consequently, both majority rule and minority rule courts have recognized that *Germain* does not address the standard for finality.[5] Every minority rule court has continued to apply its standard following *Germain*.[6] As Chief

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[4] *Quiros Lopez v. Unanue Casal (In re Unanue Casal)*, 998 F.2d 28 (1st Cir. 1993), *cited in* Opp. at 8-9, cited *Germain* only for this uncontested point and is an unexceptional application of the majority standard.

[5] For majority rule courts, see *In re Gould*, 977 F.2d 1038, 1041 n.2 (7th Cir. 1992); *Temex Energy, Inc. v. Underwood, Wilson, Berry, Stein & Johnson*, 968 F.2d 1003, 1004-05 (10th Cir. 1992); and for minority rule courts, see *In re Bonner Mall Partnership*, 2 F.3d at 904 n.11, and see also *United States v. TWA (In re TWA)*, 18 F.3d 208, 215 (3d Cir. 1994). Despite dicta in *Stanley v. Crossland, Crossland, Chambers, MacArthur & Lastreto (In re Lakeshore Village Resort, Ltd.)*, 81 F.3d 103 (9th Cir. 1996), *cited in* Opp. at 8, the Ninth Circuit has indicated that "nothing in *Germain* casts doubt upon the" minority's flexible finality standard, *In re Bonner Mall Partnership*, 2 F.3d at 904 n.11. *See Foothill Capital Corp. v. Clare's Food Market (In re Coupon Clearing Serv.)*, 113 F.3d 1091, 1098-99 (9th Cir. 1997) (continuing to apply minority standard).

[6] *See, e.g., id.*; *Stuart v. Koch (In re Koch)*, 109 F.3d 1285, 1287-88 (8th Cir. 1997); *Hammond v. Commonwealth Mortgage Corp. (In re Hammond)*, 27 F.3d 52, 55 n.5 (3d Cir. 1994).

Judge Posner said, this is "a persistent circuit split that only the Supreme Court can heal." Pet. App. 1a.

5. Respondent claims that, because permissive interlocutory appeals are available, the practical differences in the majority and minority positions are blurred, and the circuit split need not be resolved. Opp. at 11. But Respondent ignores the significant differences between final and interlocutory decisions that make it crucial for this Court to clarify the finality standard under 28 U.S.C. § 158(d). Final orders are appealable as of right.[7] On the other hand, interlocutory appeals are discretionary, both for the district court in certifying an appeal and the court of appeals in granting it. Interlocutory appeals are reserved for "exceptional" cases, and the court of appeals can reject them — even if they meet Section 1292(b)'s minimum standards — for any reason including docket congestion.[8] Thus, under the minority rule, Petitioner would have been able to appeal the district court's remand as of right, while, in the Seventh Circuit, he would have borne the burden to show exceptional reasons for an appeal. This difference among the circuits as to appeals as of right is significant to bankruptcy litigants and destroys the desirable and salutary uniformity in bankruptcy procedures.

6. This Court's claimed ability to resolve this split through its rulemaking authority does not support denial of certiorari. First, it is unclear whether Congress has granted the Court rulemaking authority to define the concept of finality in bankruptcy appeals under 28 U.S.C. § 158(d). Title 28 U.S.C. § 1292(e) empowers the Court to make rules about interlocutory appeals, not about finality, and, by its terms, 28 U.S.C. § 2072(c) grants the Court authority to define finality only for general appellate jurisdiction under 28 U.S.C. § 1291. Second, to our knowledge, there are currently no relevant proposed rules under either 28 U.S.C.

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[7] *See Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 865 (1994).

[8] *See id.* at 883 n.9; *Caterpillar Inc. v. Lewis*, 117 S. Ct. 467, 475 (1996).

§§ 1292(e) or 2072(c), and the Court should not adopt Respondent's suggestion and perpetuate this circuit split until the appropriate Advisory Committee decides to act. Under Respondent's logic, the Court would never take a case concerning the rules of evidence or civil, criminal or bankruptcy procedure; it would just fix every problem prospectively by proposing amendments to the rules for Congress's consideration.

7. To the extent that Respondent contends that this circuit split need not be resolved, Opp. at 7, she ignores the position of numerous commentators, including Judge Edith Jones, that this is a divisive issue,[9] and that it "undermines the entire bankruptcy process."[10] Petitioner respectfully submits that this Court should accept Chief Judge Posner's invitation to address a persistent circuit split that only it can heal. Pet. App. 1a.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 6, 1997

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[9] *Bankruptcy Appeals*, 16 T. Marshall L. Rev. 245, 255 (1991); *see* Pet. at 8 n.5.

[10] Towber, 29 S. Tex. L. Rev. at 590.